

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: § Case No. 23-34815 (JPN)
GALLERIA 2425 Owner, LLC. §
Debtor § Chapter 11

OBJECTION TO FINAL ORDER ON MOTION FOR USE OF CASH COLLATERAL

TO THE HONORABLE U.S. BANKRUPTCY JUDGE:

COMES NOW 2425 WL, LLC (“Respondent”) and files this Objection to Final Order on Motion for Use of Cash Collateral and would show as follows:

1. The Chapter 11 Trustee has filed a Motion for Use of Cash Collateral.
2. Respondent does not object to use of cash collateral by the Trustee. However, the terms of the proposed final order impermissibly release third party claims and limit the rights of third parties to object to claims.
3. Paragraphs 3 and 4 of the Proposed Order contains the following stipulations and agreements:
 3. Stipulations and Agreements. In consideration for the relief granted in this Order, the Trustee, on behalf of the Estate, and NBK stipulate and agree to the following:
 - a. NBK Claim. On May 23, 2018, the Debtor issued a note to NBK in the amount of \$51,675,000.00 (the “NBK Note”). Subject to any affirmative defenses to the NBK Note or the Debtor’s obligations thereunder, NBK was entitled to \$63,552,988.00 under the NBK Note on the Petition Date (the “NBK Claim”). The Trustee, on behalf of the estate, reserves all rights to challenge the amount or allowance of the NBK Claim up to ten (10) days before a hearing on any plan of reorganization for the Debtor is first scheduled for hearing with any such challenge to be heard and determined in connection with that hearing.
 - b. NBK Liens and Security Interests. The Debtor’s obligations to NBK are secured pursuant to the Deed of Trust, Assignment of Leases and Rents and Profits, Security Agreement and Fixture filing (the “NBK Deed of Trust”) and Absolute Assignment of Leases and Rents (the “NBK Assignment of Rents”), both of which were filed in the real property records of Harris County, Texas, prior to the Petition Date. NBK has a valid, enforceable, and properly perfected security interest in the Premises pursuant to the NBK Deed of Trust that has priority over any other lien or

security interest, except any lien pursuant to Chapter 32 of the Texas Tax Code. NBK also has a valid, enforceable, and properly perfected security in the rents from leases of the Premises pursuant to the Deed of Trustee and the NBK Assignment of Rents. The value of NBK's collateral does not exceed the amount it is owed.

* * *

4. Effect of Stipulations and Agreements. The Trustee's acknowledgments and stipulations in this order shall be binding on the Trustee, the Estate, and their respective representatives, successors, and assigns in all circumstances. The stipulations contained in this Order shall be binding upon all other parties in interest and all of their respective successors and assigns.

4. Paragraph 3(a) appears to state that only the Trustee may challenge the amount of the claim of NBK. It further limits the Trustee's right to challenge the NBK claim to asserting counterclaims. Under 11 U.S.C. Sec. 502(a), any party in interest may object to a claim. It is improper to cut off the rights of third parties to object to a claim without so much as a challenge period.

5. Paragraph 3(b) is worse. It stipulates that NBK's liens are valid and have priority over all liens except for tax liens. Respondent has filed Adv. No. 24-3043 in which it seeks equitable subordination against NBK. The stipulation would require dismissal of this adversary proceeding.

6. Whatever rights the Trustee might have when dealing with property of the estate, agreeing that liens are senior to those of another lien holder without the consent of the lienholder constitutes an impermissible non-consensual third-party release in violation the law of this Circuit and indeed the may violate the jurisdiction of the Bankruptcy Court as is currently being adjudicated in *Harrington v Purdue Pharma, L.P.*, (Docket 23-124). See *Nextpoint Advisors, L.P. v. Highland Capital Mgmt. L.P.*, 48 F.4th 419, 435 (5th Cir. 2022) (holding that an exculpation clause that exceeds the statutory authority of the Bankruptcy Code must be struck); *In re Pacific Lumber*, 584 F.3d 229 (5th Cir. 2009) (holding that exculpation and release clauses must narrowly construed and authorized under the provisions of 11 U.S.C. §524(e)).

7. This issue is not a question of business judgement but rather one of authority for the relief which the Trustee and the Bank are seeking. What section of the Bankruptcy Code authorizes the granting of a non-consensual third-party release in this context? Looking to *Highland Capital Mgmt.* for guidance, we see the Court may ultimately determine that the liens held by 2425 WL, LLC may be junior to those of NBK. Indeed, the Bankruptcy Code sets forth a procedure for determining those rights through an adversary proceeding and in this case an adversary proceeding is currently pending [Adv. Proc No. 24-03043] (the “Adversary Proceeding”). However, for the Bankruptcy Court to take such action on a summary basis as party of a cash collateral motion, makes a farce of the entire bankruptcy process in requiring an adversary proceeding to determine the priority of liens and further risks putting the reputation of the Bankruptcy process at risk and threatens the integrity of this Court as well as violating due process.

8. NBK and the Trustee have failed to point to any Section of the Bankruptcy Code that authorizes the abrogation of a property right by such means. For this Court to grant the relief requested would be contrary to the holdings of the Fifth Circuit in *Highland Capital Mgmt.* and *Pacific Lumber* without any contrary statutory authority.

9. While the Trustee may claim it has an urgent need for cash, such a need does not authorize or justify a court to enter an order that is violative of applicable law. Looking at the pending Adversary Proceeding, there is a forum and a procedure for NBK to obtain the relief it seeks. The parties need only move on an expedited basis to resolve the issue as to whether NBK’s claims should be equitably subordinated. This can be done with a scheduling order, expedited discovery and an expedited schedule to move to trial.

10. However, if the Court is to enter the order as submitted, it will be akin to a non-consensual-third party release. Moreover, given that the property at stake here is real property and all real property is unique, the harm that will be suffered is irreparable. See *Oppulent Life Church v. City of Holly Springs*, 697 F.3d 279 (5th Cir. 2012). Effecting property rights in this manner

strikes at the very heart of the Bankruptcy process.

11. The Motion also requires the Trustee to initiate a sales process by April 5, 2024 resulting in an auction sale to take place no later than July 1, 2024. Respondent objects to using a cash collateral motion as a sub rosa plan. The court should not approve a 90-day sale process without clear and convincing evidence that such a process will maximize the value to the estate.

12. Any adequate protection granted to NBK should be contingent upon the priority of NBK's liens being upheld.

13. Payment of expenses necessary to maintain the value of the property should be sufficient to provide adequate protection to the lender.

DATED: April 2, 2024.

Respectfully Submitted,

BARRON & NEWBURGER, P.C.
7320 N. MoPac Expwy., Suite 400
Austin, Texas 78731
Tel: (512) 476-9103

By: /s/ Stephen W. Sather
Stephen W. Sather
State Bar No.

**ATTORNEYS FOR
CREDITOR, 2425 WL,LLC**

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response was served on the 2nd day of April, 2024 to the parties on the attached list.

/s/ Stephen W. Sather
Stephen W. Sather

Label Matrix for local noticing

0541-4

Case 23-34815

Southern District of Texas

Houston

Fri Jan 19 15:17:36 CST 2024

City of Houston

Linebarger Goggan Blair & Sampson LLP

c/o Tara L. Grundemeier

PO Box 3064

Houston, TX 77253-3064

2425 WL, LLC

2425 West Loop South 11th floor

Houston, TX 77027-4304

CC2 TX, LLC

c/o Howard Marc Spector

Spector & Cox, PLLC

12770 Coit Road Suite 850

Dallas, TX 75251-1364

(p)HARRIS COUNTY ATTORNEY'S OFFICE

P O BOX 2928

HOUSTON TX 77252-2928

Houston Community College System

Linebarger Goggan Blair & Sampson LLP

c/o Tara L. Grundemeier

PO Box 3064

Houston, TX 77253-3064

Houston ISD

Linebarger Goggan Blair & Sampson LLP

c/o Tara L. Grundemeier

PO Box 3064

Houston, TX 77253-3064

National Bank of Kuwait, S.A.K.P., New York

4
United States Bankruptcy Court
PO Box 61010

Houston, TX 77208-1010

2425 WL, LLC

13498 Pond Springs Rd.

Austin, TX 78729-4422

ADT

PO Box 382109

Pittsburgh, PA 15251-8109

Ali Choudhry
1001 West Loop South 700
Houston, TX 77027-9084Ash Automated Control Systems, LLC
PO Box 1113
Fulshear, TX 77441-2013CFI Mechanical, Inc
6109 Brittmoore Rd
Houston, TX 77041-5610CNA Insurance Co
PO Box 74007619
Chicago, IL 60674-7619Caz Creek Lending
118 Vintage Park Blvd No. W
Houston, TX 77070-4095Cirro Electric
PO Box 60004
Dallas, TX 75266City of Houston
PO Box 1560
Houston, TX 77251-1560City of Houston
c/o Tara L. Grundemeier
Linebarger Goggan Blair & Sampson LLP
PO Box 3064
Houston, TX 77253-3064Comcast
PO Box 60533
City of Industry, CA 91716-0533Datawatch Systems
4520 East West Highway 200
Bethesda, MD 20814-3382Environmental Coalition Inc
PO Box 1568
Stafford, TX 77497-1568Ferguson Facilities Supplies
PO Box 200184
San Antonio, TX 78220-0184Firetron
PO Box 1604
Stafford, TX 77497-1604First Insurance Funding
450 Skokie Blvd
Northbrook, IL 60062-7917Gulfstream Legal Group
1300 Texas St
Houston, TX 77002-3509HNB Construction, LLC
521 Woodhaven
Ingleside, TX 78362-4678Harris County Tax Assessor
PO Box 4622
Houston, TX 77210-4622Houston Community College System
c/o Tara L. Grundemeier
Linebarger Goggan Blair & Sampson LLP
PO Box 3064
Houston, TX 77253-3064

Houston ISD
 c/o Tara L. Grundemeier
 Linebarger Goggan Blair & Sampson LLP
 PO Box 3064
 Houston, TX 77253-3064

Kings 111 Emergency Communications
 751 Canyon Drive, Suite 100
 Coppell, TX 75019-3857

Lexitas
 PO Box Box 734298 Dept 2012
 Dallas, TX 75373-4298

Logix Fiber Networks
 PO Box 734120
 Dallas, TX 75373-4120

MacGeorge Law Firm
 2921 E 17th St Bldg D Suite 6
 Austin, TX 78702-1572

Mueller Water Treatment
 1500 Sherwood Forest Dr.
 Houston, TX 77043-3899

National Bank of Kuwait
 299 Park Ave. 17th Floor
 New York, NY 10171-0023

Nationwide Security
 2425 W Loop S 300
 Houston, TX 77027-4205

Nichamoff Law Firm
 2444 Times Blvd 270
 Houston, TX 77005-3253

TKE
 3100 Interstate North Cir SE 500
 Atlanta, GA 30339-2296

US Trustee
 Office of the US Trustee
 515 Rusk Ave
 Ste 3516
 Houston, TX 77002-2604

Waste Management
 PO Box 660345
 Dallas, TX 75266-0345

Zindler Cleaning Service Co
 2450 Fondren 113
 Houston, TX 77063-2314

James Q. Pope
 The Pope Law Firm
 6161 Savoy Drive
 Ste 1125
 Houston, TX 77036-3343

Reese W Baker
 Baker & Associates
 950 Echo Lane
 Suite 300
 Houston, TX 77024-2824

Rodney Drinnon
 McCathern Houston
 2000 W Loop S
 Ste. 1850
 Houston, TX 77027-3744

The preferred mailing address (p) above has been substituted for the following entity/entities as so specified by said entity/entities in a Notice of Address filed pursuant to 11 U.S.C. 342(f) and Fed.R.Bank.P. 2002 (g)(4).

Harris County, ATTN: Property Tax Division
 Harris County Attorney's Office
 P.O. Box 2928
 Houston, TX 77252-2928 United States

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(u)2425 West Loop, LLC

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